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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH JAMES UNDERWOOD,

Defendant and Appellant.

C082647

(Super. Ct. Nos. CRF15287,
CRF15288)

In 2016, the trial court found that defendant Joseph James Underwood had violated the terms of his probation. The trial court revoked probation and sentenced defendant to a previously imposed but suspended 10 years in state prison. The trial court ordered defendant to pay a criminal laboratory analysis fee (Health & Saf. Code, § 11372.5)¹ plus penalty assessment and a drug program fee (§ 11372.7) plus penalty assessment even though those fees and assessments had not been previously imposed.

Defendant now contends (1) the drug program fee is unauthorized because it was not previously imposed, (2) the criminal laboratory analysis fee and drug program fee are not subject to penalty assessments, and (3) the penalty assessments must be reversed because the trial court did not articulate the basis for the fees and calculated the assessments incorrectly. We will modify the judgment in case No. CRF15288 to strike the drug program fee and associated penalty assessments and to revise the penalty

¹ Undesignated statutory references are to the Health and Safety Code.

assessments associated with the criminal laboratory analysis fee. We will affirm the judgment as modified.

BACKGROUND

Our recitation of the background is limited to circumstances relevant to the contentions on appeal. Pursuant to a global plea agreement, defendant pleaded no contest to carrying a concealed weapon (Pen. Code, former § 12025, subd. (a)(2)) and admitted a gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) and on-bail enhancement (Pen. Code, § 12022.1) in Solano County case No. FCR282137. In addition, defendant pleaded no contest to transporting a controlled substance (§ 11379, subd. (a)) in Solano County case No. FCR274317. On October 28, 2011, the Solano County trial court imposed an aggregate term of 10 years in state prison, as follows: in case No. FCR282137, three years for carrying a concealed weapon with a prior conviction (Pen. Code, former § 12025, subd. (a)(2)), two years for the on-bail enhancement (Pen. Code, § 12022.1), and four years for the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)); in case No. FCR274317, one year consecutive for transportation for sale of a controlled substance (§ 11379, subd. (a)). The trial court suspended execution of the sentence and granted defendant five years of formal probation. The trial court did not order defendant to pay a criminal laboratory analysis fee (§ 11372.5) or a drug program fee (§ 11372.7) in either case.

Jurisdiction of defendant's cases was subsequently transferred to Yolo County. (Pen. Code, § 1203.9.) Solano County case No. FCR282137 was renumbered Yolo County case No. CRF15287; Solano County case No. FCR274317 was renumbered Yolo County case No. CRF15288.

On July 5, 2016, the Yolo County trial court found defendant in violation of probation. The trial court sentenced defendant to 10 years in state prison, as follows: in case No. CRF15287, three years for carrying a concealed weapon with a prior conviction (Pen. Code, former § 12025, subd. (a)(2)), two years for the on-bail

enhancement (Pen. Code, § 12022.1), and four years for the gang enhancement (Pen. Code, § 186.22, subd. (b)(1)); in case No. CRF15288, one year consecutive for transportation for sale of a controlled substance (§ 11379, subd. (a)). In case No. CRF15288, the trial court also imposed a \$50 criminal laboratory analysis fee plus a penalty assessment of \$155 (total of \$205) (§ 11372.5, subd. (a)) and a \$150 drug program fee plus a penalty assessment of \$465 (total of \$615) (§ 11372.7, subd. (a)). The probation report had said the criminal laboratory analysis fee and drug program fee and associated penalty assessments had been previously ordered in Solano County case Nos. FCR274317 and FCR306195, and the trial court repeated that statement. Defendant appealed. Solano County case No. FCR306195 is not a part of this appeal.

In January 2017, defendant had not yet filed his opening brief when he filed a motion in the trial court to correct the fines and penalty assessments at issue in this appeal. The trial court denied defendant's motion in March 2017.

DISCUSSION

I

Defendant contends the drug program fee is unauthorized because it was not previously imposed. The Attorney General agrees the trial court did not have jurisdiction to order the fee.

As both parties acknowledge, the \$615 drug program fee was not ordered during the original sentencing in 2011 by the Solano County trial court. On revocation of probation, if a court previously imposed sentence, the sentencing judge must order that exact same sentence. (*People v. Howard* (1997) 16 Cal.4th 1081, 1087-1088.) In addition, we assume from the 2011 trial court's silence that it decided not to impose the fee because defendant lacked the ability to pay it. (§ 11372.7, subd. (b); *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517 (*Martinez*) [the trial court must determine a defendant's ability to pay a drug program fee but is not required to state its conclusion on the record, and therefore a judgment is not legally unauthorized if it fails to impose a

drug program fee and the record is silent as to defendant's ability to pay].) Accordingly, we will strike the drug program fee and the associated penalty assessment.

II

Defendant next contends the criminal laboratory analysis fee and drug program fee are not subject to penalty assessments.

We have already decided to strike the drug program fee and the associated penalty assessment. But defendant does not challenge the trial court's imposition of the \$50 criminal laboratory analysis fee. Nevertheless, he contends the trial court erred in imposing penalty assessments on the criminal laboratory analysis fee. (§ 11372.5, subd. (a); Gov. Code, § 76000; Pen. Code, § 1464.) Defendant's claim lacks merit.

Penalties or assessments must be imposed upon every fine, penalty, or forfeiture imposed by the trial court in a criminal case. (Gov. Code, § 76000; Pen. Code, § 1464.) Under section 11372.5, subdivision (a): "Every person who is convicted of a violation of [these enumerated offenses] shall pay a criminal laboratory analysis fee in the amount of fifty dollars (\$50) for each separate offense. The court shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars (\$50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law."

Because section 11372.5 describes the criminal laboratory analysis fee as an increase to the total fine, it is subject to the penalty assessments set forth in Penal Code section 1464 and Government Code section 76000. (*Martinez, supra*, 65 Cal.App.4th at pp. 1521-1522.) Although this court has agreed with *Martinez* and concluded that the criminal laboratory analysis fee and associated assessments are mandatory (*People v. Taylor* (2004) 118 Cal.App.4th 454, 456; see also *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413, 1414, fn. 3), defendant argues we should reevaluate the issue

given the recent decision in *People v. Watts* (2016) 2 Cal.App.5th 223, 237. In *Watts*, the First District Court of Appeal concluded the criminal laboratory analysis fee is not subject to penalty assessments because it is neither a fine nor a penalty. (*Watts*, at pp. 234-237.)

As this court recently explained in *People v. Moore* (2017) 12 Cal.App.5th 558, 570, “[a]lthough *Watts* advances a thoughtful interpretation of section 11372.5, we conclude the language of the statute and the weight of case authority leads to the conclusion the criminal laboratory analysis fee constitutes a fine or penalty for purposes of penalty assessments.” In addition, “the Legislature, which is presumed to be aware of longstanding judicial interpretations of statute [citation], has not amended section 11372.5 to abrogate the holding the section constitutes a fine or penalty in the nearly two decades since the decision in *Martinez, supra*, 65 Cal.App.4th at pages 1520-1522.” (*Moore*, at p. 571.)

Here, we conclude the trial court did not err in imposing penalty assessments on the criminal laboratory analysis fee.

III

Defendant further claims the penalty assessments must be reversed because the trial court did not articulate the basis for the fees and failed to correctly calculate the assessments.

Once again, our discussion is limited to the penalty assessments associated with the criminal laboratory analysis fee. The Attorney General agrees with defendant that the trial court miscalculated the assessments associated with that fee. The amount must be based on the law in effect at the time defendant violated section 11379, subdivision (a), which was February 27, 2010. (See *People v. Hamed* (2013) 221 Cal.App.4th 928, 940.) At that time the criminal laboratory analysis fee was subject to the following assessments: a \$50 state penalty (Pen. Code, § 1464, subd. (a)(1)), a \$25 county penalty (Gov. Code, § 76000, subd. (a)(1)), a \$10 state surcharge (Pen. Code, § 1465.7,

subd. (a)), a \$25 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)), a \$5 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)), and a \$5 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)). (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864.) We will modify the judgment to reflect these assessments and direct the trial court to amend the abstract of judgment. Given our disposition, we need not address whether there was a failure to articulate a statutory basis.

DISPOSITION

The judgment is modified in case No. CRF15288 to strike the drug program fee (§ 11372.7, subd. (a)) and associated penalty assessments, and to impose the following penalty assessments on the criminal laboratory analysis fee (§ 11372.5, subd. (a)): a \$50 state penalty (Pen. Code, § 1464, subd. (a)(1)), a \$25 county penalty (Gov. Code, § 76000, subd. (a)(1)), a \$10 state surcharge (Pen. Code, § 1465.7, subd. (a)), a \$25 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)), a \$5 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)), and a \$5 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)). The judgment is affirmed as modified. The trial court is directed to prepare an amended abstract of judgment reflecting the judgment as modified and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

/S/
MAURO, J.

We concur:

/S/
RAYE, P. J.

/S/
RENNER, J.